Making sense of sentencing: Lord Woolf, the Lord Chief Justice of England and Wales

Introduction

I am deeply honoured to be the first Fellow of the first Fellowship established to celebrate the contribution to Criminology of the first Director of the first Institute of Criminology in the UK, Sir Leon Radzinowicz.

I must confess that I have reached the stage of life when I find it mildly encouraging that it was in 1998, Sir Leon published his last work on Criminology (Adventures in Criminology). He was 92 years of age. He did so after he had devoted his life to the subject. Surely, with this experience the celebrated father of Criminology in England would be able to provide all the answers. Alas, no, Sir Leon acknowledges that there is no single key to unlock the door either as to what causes crime or what are the cures for crime. Sir Leon was too wise to speculate on the answers.

You will not be surprised to learn that where Sir Leon feared to tread I am not intending to rush in. Instead I am going to set myself a more modest but still a very important task and that is to identify the action that could be taken over the next four years to achieve, in the interests of the public, a more effective and strategic approach to sentencing. I am speaking out because it is timely for me to do so because the government is in the process of determining what should be, for the next four, years its policy as to sentencing.

This is the right place to address these issues because this lecture is part of the celebrations to mark the opening of this magnificent new resource for criminology (an often neglected subject) and the right audience because criminologists have an important contribution to make to achieving the improvements that are needed to the criminal justice system.

While I am focussing on sentencing, I emphasise that real progress can only be made if criminal justice is treated as a whole. It is the judges who determine sentences within the framework provided by Parliament, but the police and the CPS decide who come before the courts and the judge needs the help of the advocates to identify the most constructive sentences. It is also critical what happens to the offender after the sentence. Here I welcome the establishment of the National Offender Management Service or NOMS as it should enable the Prison Service and the Probation Service, by working jointly as a single unit, to achieve more than they could separately.

We also know that the Government should be able to make a running start because the Departments of State most involved in the CJS are under the same leadership, Mr Clarke, Lord Falconer and Lord Goldsmith. They have each, together with their distinguished predecessors, helped to bring us to where we are now.

I can identify straight away what I would like their further contribution to be:

They should identify the resources that can be made available to support our sentencing policy for the next four years and then tailor their policies to match the resources available.

In the past policies have been embarked on without sufficient attention being paid to whether or not the resources (I am not only referring to financial resources) are in place to enable the policy to be successfully implemented.

In addition, the government should recognise that what is needed now is a period of consolidation. The system has reached the limit of the amount of change it can, for the time being, absorb. There is the need before implementing a new sentencing policy for there to be wide consultation with all those with a relevant practical and academic experience.

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An Art or A Science?

This is not an expression of judicial conservatism. For the government to exercise the restraint in legislating I have suggested would be a radical change in government policy towards criminal justice.

The government should decide to exercise a self denying ordinance and declare a closed season on sentencing legislation. I understand the desire to respond to public reaction over the latest horrendous crime. However, to resist this pressure would make a significant contribution to achieving the real gains that the government and judiciary would like to see.

While criticism of the judiciary is not confined to sentencing, it is the judicial role in relation to sentencing which creates the most public controversy. The man on the Circle line will not second guess a judge's interpretation of a statute or a judgment awarding damages, but he does not hesitate to disagree with a judge's decision as to what is the appropriate sentence for a prisoner to serve. I make no complaint about this since I accept that there are no absolutes when it comes to sentencing; unless Parliament has made mandatory the sentence which should be imposed for a particular crime.

There are jurisdictions where effect is given to what I have just said and juries are given the task of determining the sentence, subject to limited rights of appeal. This happens even when what is at stake is whether the prisoner should be sentenced to death. This, it is said, is the democratic solution.

In this country we have chosen a different route. We give the task of finding the right sentence to magistrates and judges. We then place them under constraints that mean they are not entitled to pick a sentence out of the blue. First the maximum sentence for any offence is established by Parliament. Within that statutory limit the sentencing judge must consider where in the scale of gravity the crime with which he is concerned fits into the extensive frame work of sentencing for the whole range of crimes. To perform this task there has to be a careful analysis of the facts of the particular offence and this must take into account the consequences of the crime to the victim and any mitigating circumstances relating to the defendant.

Consistency is important and that is why the judge has to find the right pigeon hole in the complex structure I have identified, but the judge must, when the circumstances in the judge's opinion justify this, be prepared to impose the unconventional sentence if this is what the case requires. Judging must never be mechanistic.

While therefore the judiciary should take into account public opinion and criticism from whatever source it comes, and I include here the media, the police and politicians, they must in the end do what is their duty which is to determine what is the correct sentence irrespective of the criticism to which this may give rise. It is the judge who will know all the facts and have the training and experience to enable him to determine what is the most appropriate sentence in all the circumstances and his decision should be treated with the appropriate respect because of this.

It is sometimes said that sentencing is an art and not a science. Today, I prefer to say that sentencing is part art and part science. A judge has to combine both to achieve what are today the purposes of sentencing.

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The Purposes of Sentencing

Those purposes are now set out in the Criminal Justice Act 2003 which radically revised the approach to sentencing. The Act was the culmination of 2 fundamental and distinguished reviews of the CJS; the Auld Report and the Halliday Report. The Carter Report, which came after the Act, has also made a valuable contribution in this area.

The Act provides the focus for what I am discussing this evening. It sets out the purposes of sentencing as being (s.170 of the Criminal Justice Act 2003):

a. the punishment of offenders,
b. the reduction of crime (including its reduction by deterrence),
c. the reform and rehabilitation of offenders,
d. the protection of the public,
e. the making of reparation by offenders to persons affected by their offences.

These purposes are enlightened and should be uncontroversial. I accept that punishment should head the list but I applaud the attention that is given to the other purposes.

The extent to which we have been successful in achieving these purposes is also not controversial. Regrettably, we have not been doing as well as we should. I start with imprisonment because, although prison is also meant to deter, its primary purpose is to punish, the first statutory purpose. According to the most vociferous elements of the media, we should be sending more people to prison for longer.

This is despite the fact that the number of those sent to prison and the length to which they have been sent has been regularly increasing over a great many years. At the time of my **Strangeways Report** 14 years ago, the prison population was 42,000 and falling, while today it is 76,000 and forecast to rise. This is apparently wholly contrary to public perceptions, who believe that the courts are unduly lenient. There has been an increase in punishment right across the board.

The issue is not whether we need imprisonment. We do, it is essential. It is one of the ways society can and should demonstrate its disapproval of serious crime. While an offender its serving his or her sentence it protects the public from further crime. However, even as a punishment it has limitations. Once the prisoner has become use to the clang of the prison door prison makes little demand on most prisoners.

Positive steps in tackling offending behaviour can be taken in prison but they are able to be more successfully taken outside prison. A primary cause of prison sentences not being used more constructively is prison overcrowding. While overcrowding persists, it frustrates the ability of the Prison Service to deliver the contribution it could otherwise make to reducing crime and protecting the public by reforming and rehabilitating offenders. It is the primary explanation of why our prisons are not working better. Let me give some examples of the cancerous effects of overcrowding.

It is not easy to establish gainful employment in prisons and when they are overcrowded this almost impossible.

The Prison Service is justifiably proud of what it can achieve through its educational programmes. However the achievements could be greater, if it were not for the impact of overcrowding. The Prison Service are making ever greater efforts to ensure satisfactory arrangements are in place for the release of prisoners. If an offender is returned to society at the end of his sentence with increased skills, a job to go to and accommodation, the risk of that offender re-offending is significantly reduced. But again this is extremely difficult to achieve if an offender is being detained in a prison far from the community to which he belongs as a result of what is described as 'churning' within the prison system.

This is one of the reasons that I recommended in the report into the Strangeways Prison riots, and have continued since to advocate; the establishment of community prisons. A community prison has the advantage of the offender retaining his links with his family and the community to which he belongs. Although many governors tried to take this concept forward it is really not a practical prospect in current circumstances.

The Home Office in answer to my concerns about prison overcrowding will point to their prison building programme and I have to accept it is impressive. I do so with regret because it is hugely expensive but even if it is achieved it cannot hope to match the increase in prison numbers that the Home Office itself expects.

The present position just does not make sense. This is certainly not due to a lack of expenditure.

According to the annual reports of the Prison Service for 2002/3 and 2003/4, the net expenditure on the

prisons alone for the earlier year was £2405 million and for the later year, £2105 million. In addition, there was capital expenditure of £244 and £283 million. There is to be added to these figures, the cost of the private prisons. There is also the cost of probation services. These are huge resources and the question must be asked are we deploying them in the most advantageous manner? If we are not, then we must ask why not?

The justification for this emphasis on ever increasing use of imprisonment is that this is, so it is said, what the public demands. It is unfortunately the case that we have failed to persuade the public that there are many situations where community punishments can be more constructive in achieving the statutory purposes of sentencing than imprisonment.

They are **not** an unconstructive let-off. Those who prefer the increased use of the custodial option are not apparently deterred by the fact that the cost of actually keeping the prisoner within prison averages roughly £37,500 per year.

However, from time to time I speak to victims and their families. When I do so I do not find that they are as unreasonable and as insistent on incarceration as the media suggests. Very few are crying out for the implementation of the biblical admonition 'an eye for an eye and a tooth for a tooth'. Surveys have shown that the public's perception is that the courts are much more lenient than is in fact the case. That when the public are told what are the actual punishments imposed, they are genuinely surprised at their severity.

What will shock members of the public and victims is how unsuccessful we are at preventing re-offending. Here, the information provided by the Social Exclusion Unit in their report of 2002 is deeply disturbing. The figures speak for themselves.

The cost of re-offending by ex-prisoners is £11 billion per year and around 58% of prisoners are reconvicted within two years from their being released (the latter figure having remained approximately constant for 15 years).

The story is not entirely bleak and there has been a significant drop in crimes of certain kinds. In general, however, we seem to be trapped in a vicious circle of offending, punishment, release after serving the sentence, and re-offending.

How then do we break the vicious circle? Well I believe that the prospects of doing so are better now than they have been, at least over the period that I have been a judge. Let me explain why I am of that view:

1. Parliament has told us what are the objects of sentencing,
2. There is a greater realisation than there has been hitherto, that short prison sentences are not constructive and should only be used as a last resort.
3. Our approach to juvenile offenders has been transformed by the establishment of the Youth Justice Board. The focus on offenders under 18 has been producing positive results. It shows is that a more coordinated approach does produce results. Accordingly it is intended that what has been achieved by the Youth Justice Board in respect of young offenders should be extended to 18-20 year old offenders.
4. The same is true of women offenders. There has been a particularly sharp rise in the number of women offenders, particularly in connection with drug related crime. There is a growing appreciation of the importance of addressing their specific needs.
5. The position is the same in the area of those with mental health problems. It makes obvious good sense to tackle the substantial number of prisoners who have mental health problems in a more appropriate setting than prison.
6. Then there is the piloting that is taking place on restorative justice projects. As this audience will know, restorative justice involves offenders taking responsibility for their crime and for making amends to their victims. Restorative justice in this jurisdiction is still in its infancy. However, those who have been involved are convinced that it has significant potential to make a difference. An impressive pilot involving the London Crown Courts has been quietly taking place with the support of the Home Office and an inspirational American Criminologist Professor Lawrence Sherman. It is too early yet to establish with any degree of certainty that restorative justice reduces re-offending.

However, what can be said is that it certainly is beneficial to victims. Victims should not be compelled to take part, but many of those who do, find it significantly ameliorates the damaging effect of what happened to them. I know from my own experience of having to reconsider the tariffs in respect of juvenile offenders detained during Her Majesty's pleasure that this can be true even in relation to the gravest crimes.

7. Then, there is the contribution that can be made to sentencing by technology. The ability to create some of the advantages of a custodial sentence by the use of electronic tagging is undoubtedly an important development. I emphasise that this is not the only contribution that technology can make.
8. Finally, there is now much closer consultation between the Home Office and the judiciary on legislative proposals and changes in government policy as to criminal justice. The judiciary have set up a separate committee (the Rose Committee - named after its Chairman, the Vice President of the Court of Appeal) to achieve this. This assists in ensuring legislation will work in practice.

So from this more encouraging base, I return to the Criminal Justice Act 2003. Many of its provisions dealing with sentencing only came into force last month.

They raise the possibilities of a more focussed role for sentencing. Constructively used they could increase the public's confidence in community punishment and help achieve a breakthrough in the undue reliance on imprisonment. Many of the provisions contained in the Act, if they are to achieve their purpose, will require a huge injection of resources in support of the community punishments.

I recognise that those resources are going to be hard to find and this means that it is essential that we have a very hard look at whether it really is necessary in the interests of the public to rely increasingly on imprisonment. I am confident this is not necessary. The Government should make it clear that as a country we cannot continue to dissipate such a large proportion of the available resources on the use of imprisonment where there are more effective alternatives. In future the use of imprisonment should be focussed primarily on four situations:

1. Where imprisonment is necessary because the offender is sufficiently dangerous to make imprisonment essential for the protection of the public.
2. Where the crime is so serious that it can only be marked by a significant prison sentence.
3. Where what is needed (for example, in the case of significant white collar crime) is to mark the serious nature of the criminal conduct by a very short period of imprisonment in conjunction with other punishments. (This is often referred to as a 'clang of the prison door' sentence.)
4. Finally there is the situation where the crime itself does not make imprisonment necessary but it becomes necessary because an offender will not comply with other sentences.

The alternative is to continue with the overcrowding that reduces the effectiveness of prison and rely increasingly on executive release to avoid the prison system exploding as it did at the time of Strangeways.

Let me see how those four instances fit in with how I believe some of the provisions of the 2003 Act should be approached. I start with the provisions of Chapter 5 that apply to dangerous offenders.

Chapter 5 of the Act creates a new sentence of 'imprisonment for public protection'. This is a sentence that has most of the characteristics of a sentence of imprisonment for life. It extends to a great many offences, including motoring offences that are punishable with imprisonment of 10 years or more. This range of offences is excessive.

Where the conditions identified in the Act are satisfied, imprisonment for public protection is mandatory. The sentence is for an indeterminate period and can involve the person sentenced remaining in detention after the period necessary for punishment and deterrence has been served, unless the Parole Board is satisfied that it is safe for that person to be released. Furthermore even if the person is released, the release is on licence, with a consequential risk of recall.

The key to this sentence is a requirement that there should be 'a significant risk to the members of the public of serious harm occasioned by the Commission of further specified offences.' Courts will have to evaluate whether there is such a risk.

Such a sentence is highly controversial and if it is to accord with acceptable principles the courts must restrict its use to cases where there really is such a risk. In doing this courts will be assisted by reports from the probation service. Those reports already as a matter of course give the opinion of the probation officer as to whether there is such a risk. However, the probation officer's assessment is not an assessment necessarily based upon his or her personal knowledge of the offender.

The sentence, in due course, will require a massive injection of additional resources for the Parole Board. The Parole Board is already involved in using more resource intense procedures than was the case in the past to determine whether a life prisoner should be released. This is because of decisions of the European Court of Human Rights (ECHR) that make it clear that this is necessary if its procedures are to comply with Article 5(4) of the ECHR. In future the hearings will have many of the trappings of a trial. The days when decisions on parole were based on a paper exercise, are gone forever.

The cost of the Parole Board hearings is going to become a significant additional expense for the Home Office. In addition, it will place demands on judicial resources which it will not be easy to meet. The demands created by the new sentence, will have to be accepted. Otherwise the new sentence of detention for public protection could breach basic requirements of justice.

This innovation meets my first justification for the use of prison but it adds to rather than reduces the burden on the Prison Service. More positive aspects of the 2003 Act exist in relation to other new sentences.

In the case of sentences of less than 12 months, there is the innovation of 'custody plus', a sentence combining a short period in custody plus a period on licence with a wide range of licence conditions. This can be used in a 'clang of the prison door' situation.

There is intermittent custody which should enable a sentence to be custodial yet not interfere with the offender's ability to keep employment.

There is also a substantial improvement in the range of requirements that can be attached to a Community Order. There is the innovative requirement of unpaid work and there is an activity requirement that as its name suggests can require the offender to perform activities by way of reparation. Both these orders overcome the difficulties which can exist because of the offender's lack of resources to make amends otherwise. There are accredited programmes involving, for example, undergoing training. Finally there are the prohibited activity requirements, curfew requirements, exclusion requirements, residence requirements, and possibly most important of all, mental health treatment, drug rehabilitation and alcohol treatment requirements. Electronic monitoring can then be used for ensuring compliance.

This cocktail of requirements should go a long way to establishing a greater acceptance among the public of community sentences if, and only if, the orders are vigorously supervised and enforced.

I attach particular importance to the unpaid work requirement. One of the changes that has taken place in sentencing is the reduction in the use of a fine. This is a surprising development in the age of consumerism. The reduction in the use of fines is, I believe, at least in part attributable to a lack of resources of offenders and in part to a loss of confidence in fines due to lax enforcement. Enforcement is now being tackled and now the inability to pay can be met by an unpaid work requirement. In addition, more can be done to make it worth the offender's while to pay fines promptly. We mitigate sentences by allowing prisoners parole. We should do the same for fines by allowing a reduction for prompt payment in accordance with the order of the court, whether payment is due by a lump sum or instalments.

The increased use of fines should be matched by the vigorous pursuit of the confiscation of the proceeds of crime from offenders who commit crime for acquisitive purposes.

These new community sentences could make the critical difference. However we have to be on our guard against squandering any improvement. We must not take inappropriate action in other areas to meet popular demands for unjustifiable use of imprisonment in the case of offences where there are unintended but tragic consequences because of momentary inattention. Here there is a need to bear in mind Sir Tony Bottoms's wise comments 'the difficult task for policymakers is to recognise and build on modestly promising results of this kind, rather than succumbing to unrealistic demands for instant dramatic success stories'.

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Sentencing Guidelines Council

Having established this new range of offences it was fortunate that the Act also created the new Sentencing Guidelines Council. Its task is to provide authoratitive guidelines to courts on the level of sentencing, to enable sentencers to make decisions on sentencing that are supported by information on the effectiveness of sentences and on the most efficient use of resources. The Council is required by section 142 of the CJA 2003 to take into account:

a. The need to promote consistency in sentencing
b. The sentences imposed by Courts to which the guidelines relate
c. The cost of different sentences and their relative effectiveness in preventing re-offending
d. The need to promote public confidence in the criminal justice system.

The Council is also required to take into account the views of the Sentencing Advisory Panel.

Unlike the Court of Appeal, which had to wait for suitable cases, the Council can be - and is - pro-active in preparing its guidelines. Again, unlike the Court of Appeal, the Council does not need to confine a guideline to a particular offence or series of offences.

A guideline can be generic. Examples of this were last year's guidelines produced for reduction in sentence for guilty pleas and the critical question of seriousness.

The first guideline prepared by the Council dealt with the reduction in sentences for pleas of guilty. For many years, the courts had been in the habit of giving credit for a plea by reducing the sentences of those who plead guilty. The guidelines were only consolidating existing practice and establishing an open and clear structure which would encourage a more consistent response to a statutory obligation.

However, despite this, when the draft was first published, there was a hail of protest from many quarters who thought the guideline was a novel way of reducing sentences, the prison population and the proper reflection of the seriousness of offences, in particular in murder. However, after the consultation process had been completed, when the final guidance was published, the guideline was welcomed.

That the guideline **was** modified as a result of the consultation process illustrates how the Council intends to operate.

Crimes vary in their seriousness both because of the type of offence involved and because of the gravity of the particular offence. Guidance as to how to approach this is provided by the seriousness guideline. It establishes relative culpability, identifying general aggravating and mitigating factors and the approach to determining whether an offender has passed the community order or custody threshold.

In view of the scale of the changes made by the 2003 Act in relation to sentencing, it was decided that every judge who was engaged in sentencing should receive training from the Judicial Studies Board at a residential course. To assist in that training, the Council provided guidelines as to the preferred approach to the new sentences. The guideline is concerned with striking the right balance between the seriousness of the offence and the sentence most likely to prevent re-offending as well. In addition, guidelines dealt with the new release provisions for custodial sentences over 12 months which are set out in the 2003 Act.

In this way the Council is building upon the previous current sentencing guidelines cases. While this could take time to achieve because of the scale of the activity involved, in due course, there should be available to sentencers a code of guidelines.

The Council has also published a compendium of still relevant guideline cases. Copies of the compendium have been distributed to all courts. In addition it is included in the manual for legal advisors in Magistrates' Courts published by the Justices' Clerks' Society.

Over a period of time, the influence of the guidelines issued by the Council should be significant. An advantage of the guidelines is that in accordance with their statutory obligation, the Council must take into account the cost of different sentences and their relative effectiveness in preventing re-offending.

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The Relevance of Cost

This brings me to a subject upon which there is still considerable debate. That is the extent to which the courts should take into account the resource implications of their sentences.

Those who argue that a court should not take account of resources, contend that once a court has decided on the just sentence, it is the responsibility of the Government to ensure that the sentence is implemented. To curtail the sentence because of lack of resources is seen as a way of allowing the Government to escape its responsibility. However, this approach assumes that there is only one 'just sentence' and unlimited resources. Both assumptions are wrong. While I consider, unsurprisingly, that more resources need to be devoted to criminal justice, I recognise that the criminal justice system is in competition with, for example, education and health for resources.

This is why it is essential that the resources that are available are used in the most effective way. If a community sentence, which is far less expensive, would be suitable for an offender, as a punishment for his crime and it would be constructive, it is wrong in principle to send him to prison. If there are no resources for drug treatment and training orders, it is pointless imposing such orders. The Council is required to take into account the cost effectiveness of different sentences in the drawing up of guidelines. Since courts are required to take into account the guidelines issued by the Council when sentencing, the courts indirectly are required by Parliament to do the same.

It is wrong to say that to tailor sentences to the resources, is to allow the Government off the hook. The courts and the senior judiciary are quite capable of drawing attention to the effect of lack of resources.

What I have said about restricting the increase in the use of prison is not only based on resources. It is based also on the fact that if there is a properly resourced community punishment that is a suitable alternative, the results of such a sentence are more likely than imprisonment to be in the interests of the public.

The position will remain that where resources are most urgently needed, is for the Probation Service, now part of NOMS. The Probation Service is the key to tackling re-offending. This is so whether we are considering the person who is sentenced to a Community Sentence or the person who has been sentenced to imprisonment and is returning to the community. The role of the Probation Service is critical. We have to raise the standards of the Probation Service. The first priority is to improve their morale and effectiveness.

We now have more police. As a result more offenders are going to come before the courts. The courts in coordination with the other criminal justice agencies are providing a more effective service to victims, witnesses and defendants during the trial process. We must now tackle what is not being achieved by sentences that the courts impose. We must make inroads into the abysmal re-offending rates.

Success in doing this could transform the situation. Our efforts must not be deflected by the protests from those who ignore the reality of the situation we are in.

It follows that my recipe for bringing sense into sentencing involves:

a. Developing a consensus as to what resources should be available to the criminal justice system and ensuring that those resources are used in the manner which is most likely to provide the best protection for the public.
b. Using the platform that Parliament and the Government have now provided to halt the continuing rise in the use of imprisonment and instead confining imprisonment primarily for the most serious offences and, in particular, for violent and dangerous offenders;
c. Making the broad range of community punishments really meaningful so that they prevent re-offending and inspire confidence in the public;
d. Providing more extensive drug and other substance abuse testing and training;
e. Relying more on properly enforced fines and the confiscation of the proceeds of crime.
f. Avoiding further legislation except when it is absolutely necessary so as provide the courts and NOMS with the opportunity they need to absorb the changes that have been made and deliver an effective criminal justice system.

Thank you.